No. 84-581

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL W. LASKY,

Appellant,

against

JOHN VAN LINDT, Chairman of the New York State Racing and Wagering Board; JOSEPH O'DEA and BERTRAM D. SARAFAN, individually and as members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

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TABLE OF CONTENTS

	PAGE
Opinions and Orders Below	1
State Statute Involved	2
Statement of the Case	2
The Court Is Without Jurisdiction Over This Appeal	10
A. Appellant Does Not Have A Due Process Right To Be Heard By The New York State Racing And Wagering Board Before It Decides His Application For A Thoroughbred Owner's License	10
1. Appellant Does Not Have A Protected Interest In The Administrative Decision On His Application	10
2. Appellant Does Not Have A Right To Be Heard Before The Administrative Agency Denies His Application	17
B. Appellant's Interest In Free Speech Was Not Involved In The Consideration Of His Application For A Thoroughbred Owner's License By The New York State Racing And Wagering Board, And Even If It Was Involved, It Was Not Infringed	18
C. New York Racing, Pari-Mutuel Wagering And Breeding Law § 213(2) is not Unconstitutionally Vague Because It Includes The Word Tout	22

PAGE

D. Appellant's Claim That The Denial Of His Application For A Thoroughbred Owner's License By The New York State Racing And Wagering Board Was The Result Of Selective Prosecution Is Not Colorable 25

Conclusion 26

Supplemental Appendix

Example One 1a

Example Two 7a

Example Three 10a

Example Four 14a

Example Five 16a

TABLE OF AUTHORITIES

PAGE

Cases:

Arnett v. Kennedy, 416 U.S. 134 (1974) 21

Barry v. Barchi, 433 U.S. 55 (1979) 13, 15
Board of Regents v. Roth, 408 U.S. 564 (1972) *passim*
Bonacorsa v. Barry, 664 F.2d 346 (2d Cir. 1981) 16
Burns v. Alcala, 420 U.S. 575 (1975) 22

Codd v. Velger, 429 U.S. 624 (1977) 18
Connick v. Myers, 103 S. Ct. 1684 (1983) 21
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 20

Fink v. Cole, 1 N.Y.2d 488 (1956) 9, 13

Lewitus v. Colwell, 497 F. Supp., 439 D. Md. 1979) 15, 23
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 20

Medina v. Rudman, 545 F.2d 244 (1st Cir. 1976), *cert. denied* 434 U.S. 891 (1977) 9, 15
Meyer v. Nebraska, 262 U.S. 390 (1923) 15

N.Y.S. Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 15

Oyler v. Boles, 368 U.S. 448 (1962) 26

Paul v. Davis, 424 U.S. 693 (1976) *passim*
Perrin v. United States, 444 U.S. 37 (1979) 22
Perry v. Sinderman, 408 U.S. 593 (1972) 19, 20

Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748 (1976) 20

PAGE

State Constitution and Statutes:

New York Constitution, Article 1, § 9 2
New York Civil Practice Law and Rules, Article 78 9
New York Racing, Pari-Mutuel Wagering and Breeding Law
Sec. 101 3
Sec. 213 *passim*
Sec. 222 2
Sec. 321 13
New York Unconsolidated Laws
Sec. 7915 *passim*
Sec. 7952 3
Sec. 8022 13
Sec. 8162 3
L. 1982, c. 865
Sec. 1 2
Sec. 2 2

Rules and Regulations:

Supreme Court Rule 15 2
9 New York Codes, Rules and Regulations
Sec. 4001.7 11
Sec. 4001.8 11
Sec. 4002.9 3
Sec. 4002.10 4
Sec. 4002.16 7, 13
Sec. 4042.4 17

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Opinions and Orders Below

The jurisdictional statement (at 1) does not reference the June 14, 1984 order of the New York Court of Appeals dismissing *Lasky* v. *Van Lindt, et al.*, after summary review, on the ground that the appeal did not directly involve a substantial constitutional question. The order of the Court of Appeals is reported at 62 N.Y.2d 942 and is reproduced at 10a-11a of the appendix ("App.") to the jurisdictional statement.

The jurisdictional statement (at 1) does not reference the January 25, 1982 decision of appellee New York State Racing and Wagering Board (the "Board") denying appellant an owner's license to race a thoroughbred horse at the several tracks within the state where betting is legal. The decision is not reported. Appellant has reproduced the decision, in part, at App. 27a-29a. He has omitted five examples of his publications which the Board included. *See* decision at App. 27a, stating that examples are annexed. In the examples, appellant promises racing fans sure winners for a fee. The examples are reproduced in the supplemental appendix to this motion. Appellees seek the printing costs for the supplemental appendix ("S. App.") from appellant. *See* Supreme Court Rule 15(1)(j)(ii).

State Statute Involved

The jurisdictional statement (at 3-5) sets forth § 7915 (2),(3) of the New York Unconsolidated Laws, title 21 (McKinney 1979). Both subsections were repealed, with all of title 21, by L. 1982, c. 865, § 2, effective April 1, 1983. They were reenacted, with technical amendments not here relevant, by § 1 of the same law. Chapter 865, § 1, also recodified title 21 as chapter 47-A of the New York Consolidated Laws and renumbered the sections. Former § 7915(2) is now § 213(2) of the New York Racing, Pari-Mutuel Wagering and Breeding Law (McKinney 1984). Former § 7915(3) is now § 213(3) of that law.

Statement of the Case

New York permits legal betting on only one sport—horse racing. N.Y. Const. art. 1, § 9; New York Racing, Pari-Mutuel Wagering and Breeding Law § 222 (McKin-

ney 1984), formerly New York Unconsolidated Laws § 7952 (McKinney 1979). To assure the integrity of the sport, the New York State Racing and Wagering Board (the "Board") regulates all racing and betting activities within the state, including the licensure of thoroughbred owners. Racing, Pari-Mutuel Wagering and Breeding Law §§ 101, 213(1),(2), formerly Unconsolidated Laws §§ 7915(1),(2), 8162. The Board must deny a thoroughbred owner's license unless it is satisfied that the applicant has the financial responsibility, experience, character and fitness to participate in the sport in a manner consistent with the best interests of racing and the public interest. Racing, Pari-Mutuel Wagering and Breeding Law § 213(2). The Board also may deny a thoroughbred owner's license if it finds that the applicant is engaging, or has engaged, in conduct inimical to the sport as defined by § 213(2). Section 213(2) lists, among other kinds of conduct, the occupations of bookmaker and tout, "similar pursuits," consorting with persons so engaged, and fraud or misrepresentation, or attempted fraud or misrepresentation, in connection with racing. See text of § 213(2), set forth, in relevant part, in the jurisdictional statement at 4.* Owners whose applications for licenses are denied by the Board are not entitled to predetermination administrative hearings. Racing, Pari-Mutuel Wagering and Breeding Law § 213(3), formerly Unconsolidated Laws § 7915(3), text set forth, in

* The jurisdictional statement (at i, 7, 19) references § 4002.9(a), New York Codes, Rules and Regulations, title 9, the implementing regulation for Racing, Pari-Mutuel Wagering and Breeding Law § 213(2). The text of the regulation and the text of the relevant part of the statute are the same in all material respects. The regulation is not separately addressed in this motion.

relevant part, in the jurisdictional statement at 4.* The owners are entitled to seek immediate relief from the state courts in proceedings against the Board under Article 78 of the New York Civil Practice Law and Rules. *Ibid.*

Michael W. Lasky, a/k/a William Cashem, a/k/a Mike Warren (the "appellant") filed an application with the Board for a thoroughbred owner's license on August 20, 1981. He listed himself as the president of the *Baltimore Bulletin* which he styled as a "direct mail advertising" publication. Lasky License Application at 2 ¶ 15. During its investigation of the appellant, the Board asked for and received a report from the Thoroughbred Racing Protective Board ("TRPB"), a nationally accepted source of information about the sport. App. 3a; affidavit of Stephen J. Cipot, Assistant Director of Investigations and Audits for the Board, sworn to February 5, 1982 ("Cipot affidavit"), at ¶ 6. The TRPB report included examples of appellant's publications which disclosed that the *Baltimore Bulletin* was a tip sheet and that appellant published other tip sheets—open letters from the National and California Turf Clubs and *Mike Warren Sports*—under the Cashem and Warren aliases. App. 27a-28a; Cipot affidavit at ¶¶ 7, 8.**

* The jurisdictional statement (at 10) references § 4002.10, New York Codes, Rules and Regulations, title 9, the implementing regulation for Racing, Pari-Mutuel Wagering and Breeding Law § 213 (3). The text of the regulation and the text of the relevant part of the statute are the same in all material respects. The regulation is not separately addressed in this motion.

** Appellant asks the Board's source for the examples of his publications. Jurisdictional Statement at 11. His question was answered at the outset of state court proceedings—the TRPB report. Cipot affidavit at ¶¶ 6-8. Although appellant repeatedly characterizes

(footnote continued on next page)

The Board considered eight examples of appellant's publications from the TRPB report. It annexed five to its January 25, 1982 decision. App. 27a; S. App. 1a-21a. Two are open letters from the National Turf Club. The first letter (S. App. 1a-6a) identifies appellant, a/k/a William Cashem, as the Club's Racing Secretary. *Id.* at 1a. It then tells racing fans that "Cashem will . . . supervise one of the biggest . . . stable killings of all time at Saratoga on August 18" (*ibid.*) and "will make certain . . . [that they] collect on a no ifs, ands or buts winner." *Id.* at 4a. The letter characterizes Cashem's information as a "closely guarded secret" that leaves "nothing to chance." *Ibid.* It concludes by offering the tip for $10. *Id.* at 5a-6a. The second letter (*id.* at 7a-9a) tells racing fans about a "completely foolproof" "coup" at Belmont Park on June 28 in which "every possible risk will be considered and attended to." *Id.* at 7a, 8a. It concludes by offering the "100% perfect" tip for $100. *Id.* at 9a. The third example (*id.* at 10a-13a) is a signed issue of *Mike Warren Sports* in which appellant, using that alias, "guarantee[s]" a winner at Santa Anita on October 3 to the first "one hundred" to send in $100. *Id.* at 10a, 11a, 12a. The issue goes on to explain that the pre-payment is necessary because the "information" is "so strong"—appellant claims it is from "a man who is never wrong"—that "I had to lay out the money [for it] in advance." *Id.* at 11a. The fourth and fifth ex-

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the examples as "misused", "defamatory" and not probative (jurisdictional statement at 11, 12, 17-18; brief for petitioner-appellant in the Appellate Division, Second Department at 10), he does not disown the Cashem and Warren aliases. Nor does he identify a phrase, or even a word, in the examples as untrue or as inaccurately transcribed or reproduced. *See* Jurisdictional Statement at 11, accepting the examples "at face value" and Appellate Division brief at 10, accepting the accuracy of the examples *arguendo* without addressing them again.

amples, respectively an advertisement from the April 11, 1981 issue of the *New York Daily News* (*id.* at 14a-15a) and an open letter, dated November 25, 1974, to friends of the *Baltimore Bulletin* (*id.* at 16a-21a), include photographs of the appellant under the Mike Warren alias. The advertisement says that appellant has learned to "rob race tracks legally" and that he is prepared to tell the reader how to do so. *Id.* at 14a. The letter says that the appellant has a "new way to sure-fire racing profits" (*id.* at 16a) and that his success depends on taking "mighty good care of" his "contacts . . . [and] connections" who keep him "informed." *Id.* at 20a. It then observes that "information costs money" and that "I have no way to pay my sources except from pay-win profits." *Ibid.* It concludes by asking for $5 to participate in the system, an amount the participant can deduct from the proceeds of $5 win wagers he promises to remit on each winning tip. *Ibid.*

Two articles and a letter from the *Baltimore Bulletin*, all using the Mike Warren alias, are the examples of appellant's publications included in the record but not annexed to the Board's January 25 decision. One article tells the reader he can't lose at Saratoga on August 27. The "*Baltimore Bulletin* and Mike Warren" "guarantee" the results "100%." To get the tip, the reader must pay $10 and the proceeds of a $5 win wager. The other article describes *Under the Shedrow*, a publication of the *Baltimore Bulletin*, that "lets you in on winners." The article includes a coupon, to return with a $10 fee, that acknowledges that the sender is "guaranteed a winner" and tells him to call "Mike" on the day of the race to get the tip. In the letter, appellant says that he is going to Saratoga to

"supervise" his "network of information [gatherers]" so he can provide the "hottest and freshest inside information." Readers are instructed to arrange for appropriate payments when they call Mike for the tips.*

On November 25, 1981, the Board, through counsel, informed appellant that it was likely that his application for a thoroughbred owner's license would be denied because he was a tout within the meaning of Racing, Pari-Mutuel Wagering and Breeding Law § 213(2), i.e. an individual who sells purported winning selections in horse races for money. App. 4a, 5a, 14a ¶ 11. A series of communications between appellant's counsel and the Board's counsel ensued. App. 15a-16a ¶¶ 15-17. They include a letter from appellant's counsel in which he claims that, in racing circles, a tout is an individual who sells different winning horses in the same race to different bettors. App. 19a. The Board denied appellant's application on January 25, 1982, following its receipt of the letter. App. 19a, 29a. Appellant had raced his horse once in New York, at Belmont Park, while his license application was pending before the Board. App. 13a, 14a ¶¶ 7, 8, 16a ¶ 17. *See* § 4002.6, New York Codes, Rules and Regula-

* Appellant gives two reasons why the eight examples of his publications that the Board considered are not probative of his fitness for a thoroughbred owner's license. Appellant first contends that the examples do not mention him "by name". Jurisdictional Statement at 11. True, the examples do not mention appellant by the name Lasky. They do mention him by the names Cashem or Warren, aliases he does not disown. Appellant next contends that the examples are of corporate publications without relation to any corporate officer. *Id.* at 11, 12, 17. Two incontrovertable facts are omitted. First, the record does not even suggest that any of the organizations for which appellant writes or publishes are incorporated. Second, the eight examples give the appellant's personal guarantee, either as Cashem or Warren, not a corporate guarantee. See discussion above at 5-7. Indeed, two of the examples even include the appellant's photograph. S. App. 14a, 16a.

tions, title 9, authorizing a racing steward to permit an owner to enter his horse pending the Board's disposition of his license application.

The Board's written decision finds that appellant is a tout and not fit for a license under Racing, Pari-Mutuel Wagering and Breeding Law § 213(2), while he continues in that occupation. App. 27a, 28a. The Board first notes its review of examples of appellant's publications. App. 27a. It then sets forth its conclusions, drawn from that review, about appellant's activities as a tout (App. 27a-28a): he tries to create the impression that he has inside information about which horse will win a race; he clearly implies that he has information that goes far beyond what the best legitimate handicapper could provide; and he suggests that he has obtained the information in a manner contrary to law or, at least, contrary to the rules of racing. The Board concludes by giving two reasons why licensing the appellant would be inappropriate (App. 28a-29a): first, licensing the appellant might be taken by the public as an endorsement of his touting activities when the legislature and the Board consider those activities inconsistent with racing's best interests; and second, licensing the appellant would create actual and apparent conflicts of interests which would be harmful to the public perception of racing. For example, appellant's sale of tips could create conflicting financial incentives for him in races in which his horse was entered; he could affect the odds in the races in which his horse was entered by selling more, less or various tips; and his past selections, later competing against his own horse, would affect the odds even if he did not sell selections for the later races. App. 28a. *See* e.g. S. App. 6a, 11a, 13a.

where appellant tries to restrict the distribution of his tips to protect the odds.

Appellant immediately challenged the Board's denial of his license application in a proceeding in state supreme court under Article 78 of the New York Civil Practice Law and Rules. On June 21, 1982, a special term of that court affirmed the Board's decision. App. 6a. The special term opinion repeats the description of appellant's touting activities provided by the Board and the actual and apparent conflicts of interest the Board noted. App. 3a-4a, 5a. It then addresses and rejects appellant's two legal claims. App. 4a-6a. Appellant's contention that § 213(2) is overly broad or unconstitutionally vague unless tout is defined as an individual who sells different winners in the same race to different bettors is considered first. App. 4a. In response, the special term adopts the definition of tout offered by the Board, i.e. an individual who sells racing selections for gain, often purportedly based on inside information. App. 4a-5a. It then upholds the statute, finding that a "fair reading of its language, as measured by common understanding and practice," clearly gives adequate warning of the conduct it prohibits. App. 5a-6a. The state's vital interest in protecting the integrity of horse racing because of the related gambling activity and the fact that the sport, like greyhound racing (*Medina* v. *Rudman*, 545 F.2d 244, 250-51 [1st Cir. 1976], *cert. denied* 434 U.S. 891 [1977]), is not a common occupation, are cited as supportive. App. 5a, 6a. Special term next considers appellant's contention that he had a due process right to an administrative hearing before the Board acted on his application. App. 6a. *Fink* v. *Cole*, 1 N.Y.2d 488 (1956), is cited for the proposition that there is no state

law right to a predetermination hearing upon the denial of a thoroughbred owner's license. *Ibid.* Special term then concludes that appellant has no "claim of entitlement" which requires the Board to grant him a hearing. *Ibid.*

Appellant pursued his challenge to the Board's denial of his license application to the Appellate Division, First Department. That court affirmed the special term judgment on November 15, 1983. App. 9a. The New York Court of Appeals summarily dismissed appellant's further appeal on June 14, 1984, after permitting him an opportunity to be heard, on the ground that no substantial constitutional question was directly involved. App. 10a-11a.

THE COURT IS WITHOUT JURISDICTION OVER THIS APPEAL.

A. Appellant Does Not Have A Due Process Right To Be Heard By The New York State Racing And Wagering Board Before It Decides His Application For A Thoroughbred Owner's License.

1. *Appellant Does Not Have A Protected Interest In The Administrative Decision On His Application.*

Appellant's first challenge to New York Racing, Pari-Mutuel Wagering and Breeding Law § 213(2),(3) (McKinney 1984), formerly New York Unconsolidated Laws § 7915 (2),(3) (McKinney 1979), invokes the Due Process Clause to protect two supposed interests in "liberty" or "property." Jurisdictional Statement at 13-16. Prior decisions of this Court in *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), immediately defeat the challenge. They foreclose any possibility that appellant's

asserted interests—protecting his good name and entering his horse in races on which betting is legal—can be encompassed by the terms "liberty" or "property" and, perforce, leave appellant's concerns outside the protection of the Due Process Clause.

Appellant's asserted reputational concern refers to the denial of his application for a thoroughbred owner's license by the New York State Racing and Wagering Board (the "Board") on January 25, 1982. Jurisdictional Statement at 13, 14. Appellant claims that the Board's decision falsely labels him a tout, and makes related, presumably false, findings about the negative effect his occupation has on his fitness for a license, his improper efforts to obtain inside wagering information and conflicting interests which would burden him and the public were he to be licensed and continue his occupation. *Id.* at 10-12, 13-14. Appellant then claims that the Board stigmatized his reputation when it published the decision. *Id.* at 13-14.* Even if appellant's claims about the Board's decision are accepted as true, they are not sufficient to establish a protected interest in "liberty" or "property." *Paul* v. *Davis, supra.* There, this Court, faced with a claim by an individual falsely identified as a shoplifter by the police, said: " '[S]tigma' . . . [to] reputation alone, apart from some more tangible interests . . . . is "[neither] 'liberty' [nor] 'property' by itself

* Appellant miscites § 4001.7, title 9, New York Codes, Rules and Regulations ("NYCRR"), to establish the fact that the Board must publish its decisions. Jurisdictional Statement at 14. The correct citation is 9 NYCRR § 4001.8. The section requires the Secretary to the Board to "certify" Board decisions as "official action" and to "promulgate" them. *See Paul* v. *Davis*, 424 U.S. at 713-14 (federal Constitution does not protect against the publication of records of official acts).

sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701.

Appellant tries to show that his supposed interests in "liberty" and "property" survive scrutiny under *Paul* v. *Davis, supra,* because he has a "tangible interest," apart from his reputation, in the Board's decision. Jurisdictional Statement at 13, 14-16. The nonreputational interest appellant asserts is entering his horse in races on which betting is legal. *Ibid.* To establish it as "tangible" under *Paul* v. *Davis,* appellant is obliged to show that the interest arises from either of two sources, that it existed before the Board's decision and that the decision distinctly altered or extinguished the interest. 424 U.S. at 700, 710-13. One appropriate source for the interest is a specific federal constitutional guarantee which the Due Process Clause of the Fourteenth Amendment makes applicable to the states. *Id.* at 700, 712-13. *See Board of Regents* v. *Roth,* 408 U.S. at 569-72 (listing specific constitutional guarantees made applicable to the states by the Fourteenth Amendment). The other appropriate source is a state law entitlement—a right "initially recognized" and "vouchsafed" to the individual under state law and "thereby protected" under the Due Process Clause of the Fourteenth Amendment. *Paul* v. *Davis.* 424 U.S. at 710, 712.

The first source appellant claims for his asserted "tangible interest" in racing his horse is an underlying state law entitlement to either a thoroughbred owner's license or a predetermination hearing before the Board. Jurisdictional Statement at 14. 16. *See Paul* v. *Davis,* 424 U.S. at

710-12 and discussion just above. Reference to the relevant New York law, Racing, Pari-Mutuel Wagering and Breeding Law § 213, establishes that the supposed state law entitlement does not exist.* Thoroughbred owners cannot race in New York unless and until they obtain licenses under § 213 (1),(2). They are not entitled to licenses, or to apply for licenses, under any other provision of state law as appellant's entitlement theory would require. Similarly, applicants for thoroughbred owners licenses in New York are denied a predetermination hearing right under § 213(3). They are not granted a hearing right under that subdivision or any other provision of state law as appellant's entitlement theory would require. In *Fink* v. *Cole*, 1 N.Y.2d 48 (1956), the New York Court of Appeals construed subdivision 3 as denying a predetermination hearing right and found, in consequence, that applicants for New York thoroughbred owner licenses have no statutory entitlement to such hearings. *See also* special term opinion at App. 6a, noting absence of statutory entitlement to predetermination hearings.**

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* At one point (jurisdictional statement at 14), appellant claims a "legitimate expectation of continued licensure in New York" without identifying any relevant state law. The claim apparently relies on the fact that appellant's horse raced once at Belmont Park, in September 1981, while appellant's license application was pending before the Board. App. 13a-14a ¶¶ 7, 8, 16a ¶ 17. The relevant New York Law is 9 NYCRR § 4002.16, which authorizes a racing steward to permit an owner "to start" pending [Board] action" on his license application. Any expectation of licensure that appellant may claim from this source could not have continued past January 25, 1982, the date the Board denied his application. App. 29a.

** New York's regulation of harness racing licenses, considered in *Barry* v. *Barchi*, 433 U.S. 55 (1979), is distinguishable on this point. Racing, Pari-Mutuel Wagering and Breeding Law § 321, formerly Unconsolidated Laws § 8022, the statute referrenced in *Barchi*, *id.* at 60 n. 8, grants applicants for harness racing licenses a predetermination hearing right.

Indeed, appellant himself acknowledges that his asserted state law entitlement is non-existent when he admits that the interest the entitlement is supposed to protect—entering his horse in races on which betting is legal—is a right he would have acquired only if the Board had granted his license application. Jurisdictional Statement at 10, 14-16. Since appellant admits that his only right to race in New York arises from the state license statutes, he must also admit that he has no state law right to race outside the license statutes. Therefore, appellant's asserted state law entitlement claim depends on a predicate which, given his initial admission, does not exist. The same admission also forecloses any possibility that appellant can establish a "tangible interest" under *Paul* v. *Davis*, 424 U.S. at 710-12, with a state law entitlement as its source. See discussion *ante*, at 11-12. Moreover, again given appellant's admission that he would only obtain a right to race if the Board had granted his license application, he cannot demonstrate, as *Paul* v. *Davis* requires, that the Board's decision denying his application distinctly altered or extinguished a pre-existing right. See discussion *ante*, at 12. Notably, all of the cases appellant cites in the jurisdictional statement at 13-16 (except *Medina* v. *Rudman*, 545 F.2d 244 [1st Cir. 1976], *cert. denied* 434 U.S. 891 [1977], discussed below) involve the loss of pre-existing "tangible interests" and are distinguishable from the case at bar for that reason.

The second source appellant claims, or appears to claim, for his asserted "tangible interest" in racing his horse is a specific federal constitutional guarantee. Jurisdictional Statement at 15-16. *See Paul* v. *Davis*, 424 U.S. at 700, 712-13 and discussion *ante*, at 12. The guarantee appellant in-

vokes is the right "to engage in the common occupations of life," *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), a right this Court recognized as a protected "liberty" interest in *Board of Regents* v. *Roth,* 408 U.S. at 572. However, racing a thoroughbred horse when betting is legal is not a "common" occupation, i.e., one in which the citizenry at large has a right to participate. *Medina* v. *Rudman,* 545 F.2d at 250-52 (participating in greyhound racing when betting is legal held not a common occupation). Like other activities states may prohibit in the public interest, access to thoroughbred racing and the associated gambling activities is discretionary with the Board and strictly regulated. *See Medina* v. *Rudman, supra; N.Y.S. Liquor Authority* v. *Bellanca,* 452 U.S. 714, 717-18 (1981) (state's power to ban an activity entirely, there the consumption of alcohol, includes the lesser power to limit the circumstances under which it will be allowed); *Barry* v. *Barchi,* 443 U.S. at 64-65 (state interests in the integrity of harness racing are significant and may be strictly enforced, *inter alia,* by the prehearing suspension of licenses); *Lewitus* v. *Colwell,* 497 F. Supp. 439, 445-46 (D. Md. 1979) (regulation virtually identical to statute involved in case at bar held to reflect particularly important and sensitive state issues that require strict regulation). *Contrast* jurisdictional statement at 15-16, where appellant suggests that thoroughbred racing is a "common occupation" in New York because many licenses may be issued and tries to discredit special term's reliance on *Medina* v. *Rudman* (App. 6a) on the theory that the state's interests in racing-related gambling are protected adequately if only race track owners, not race horse owners, are regulated.

Appellant attempts to enhance the "tangibility" of his interests in the Board's denial of his license application by claiming that the denial has, or will, foreclose his subsequent licensure in New York and other jurisdictions. Jurisdictional Statement at 14-15. The effort is in vain for several reasons. First, as shown above, appellant has no "tangible interests" in the Board's denial of his license application, and his effort to enhance these nonexistent interests by claiming their present or potential foreclosure is, therefore, a nullity. Second, the Board's denial has only transitory effect in New York. It is directed to the appellant "while he is engaged in his current occupation" (App. 28a), leaving him free to reapply if he changes his occupation or even if he just wants to try to persuade the Board to reach a different result. *See Bonacorsa* v. *Barry*, 664 F.2d 346, 347 (2d Cir. 1981) (denial of harness license held without foreclosing effect for similar reasons). Third, although appellant claims other jurisdictions have, or will, give reciprocal effect to the Board's decision, he does not provide the decisions on his license applications or the content of the rules that he claims require this result.* Indeed, were other jurisdictions to apply the Board's decision in the manner appellant suggests, his due process challenge would be properly directed against their actions, not against the Board. Fourth, even assuming that the Board's decision has, or will have, some impact on appellant's racing opportunities in New York and other states, that impact is far afield from

* Appellant mischaracterizes the New York rule on point, 9 NYCRR § 4042.4(a),(b). It bars individuals from New York tracks, subject to further action by the Board, whose licenses have been suspended or revoked, not denied, by other jurisdictions. *Contrast* jurisdictional statement at 15, where appellant claims that the regulation bars individuals whose licenses have been denied by other jurisdictions.

the effects this Court has considered sufficient to support the foreclosure of protected or "tangible interests." *See Paul* v. *Davis*, 424 U.S. at 701-10; *Board of Regents* v. *Roth*, 408 U.S. 573-74. Under the Board's decision, the appellant is not foreclosed from all racing licenses, much less all public employment. Nor is he foreclosed from a particular profession or occupation, either permanently or for a particular period of time.

2. *Appellant Does Not Have A Right To Be Heard Before The Administrative Agency Denies His Application.*

Appellant's claim that he has a due process right to be heard before the Board decides his application for a thoroughbread owner's license depends on his characterization of the tout label as false. Jurisdictional Statement at 10-12, 13-14. In this case, the label must be accepted as true, and appellant's claim dismissed for that reason even if his asserted reputational and horse racing interests are considered *arguendo* to be "liberty" or "property" interests.

The due process hearing appellant seeks is intended to provide an individual whose reputation has been, or may be, stigmatized with an opportunity to clear his name. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977); *Board of Regents* v. *Roth*, 408 U.S. 564, 573 n. 12 (1972). If it is to serve any useful purpose, there must be "some factual dispute" about the truth of the charge the party seeking the hearing claims as the source of the stigma. *Codd* v. *Velger*, *supra* (terminated public employee who did not raise factual dispute about truth of allegedly stigmatizing charge held not entitled to due process hearing to clear his name).

Appellant is in no better position with respect to his claimed hearing right than the respondent in *Velger*. Although appellant repeatedly characterizes the Board's finding that he is a tout as false and inaccurate (jurisdictional statement at 10-12, 13-14, 17-18), he does not dispute the factual predicate for the charge, the contents of the eight tip sheets on which the Board relied in denying his license application. See discussion *ante*, at 4-7, 8-9. Rather, he accepts their content "at face value," or as true, in this Court (jurisdictional statement at 11), as he did below (brief for petitioner-appellant in the Appellate Division, Second Department at 10), and rests his claim entirely on a question of state law. The question is the appropriate definition of the word tout (jurisdictional statement at 17-19), a question that could not be tried at the predetermination administrative hearing appellant claims was unconstitutionally denied him.

B. Appellant's Interest In Free Speech Was Not Involved In The Consideration Of His Application For A Thoroughbred Owner's License By The New York State Racing And Wagering Board, And Even If It Was Involved, It Was Not Infringed.

Appellant's second challenge to New York Racing, Pari-Mutuel Wagering and Breeding Law § 213(2),(3) (McKinney 1984), formerly New York Unconsolidated Laws § 7915 (2),(3) (McKinney 1979), invokes a supposed free speech interest in the consideration of his application for a thoroughbred owner's license by the New York State Racing and Wagering Board (the "Board") and, perhaps, in a predetermination hearing before the Board. Jurisdictional Statement at 16-17. To support the challenge, appellant

offers six statements about freedom of speech and the nature of his business which are, variously, irrelevant and false and, perforce, insufficient. *Ibid.*

Four of appellant's statements (the references to *Perry* v. *Sinderman*, 408 U.S. 593 [1972], and *Board of Regents* v. *Roth*, 408 U.S. 564 [1972] in the jurisdictional statement at 17 are excepted) are both irrelevant and false because they assume that the Board's denial of appellant's license application regulated his occupation as a tout or his advertising of his occupation when, instead, it prohibited him from entering a thoroughbred horse in races on which betting is legal.

Four of appellant's five statements about freedom of speech, including the reference to prior adversary hearings and *Board of Regents* v. *Roth, supra* (and again excepting the reference to *Perry* v. *Sinderman, supra*) are irrelevant because, as the cases appellant cites demonstrate, they refer to direct restraints on speech, not to license qualifications. *See* e.g. *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980) (bill inserts discussing public concerns prohibited); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977) ("for sale" and "sold" signs on residential property prohibited); *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising prescription drug prices prohibited), all cited in the jurisdictional statement at 17. Indeed, the quotation from *Board of Regents* v. *Roth* appellant cites to support his claimed right to a predetermination hearing on his license application (jurisdictional statement at 17) states that it is referring to direct restraints on speech: "When a State would *directly impinge* upon in-

terests in free speech or free press, this Court has *on occasion* held that opportunity for a fair adversary hearing must precede the action whether or not the speech or press interest is clearly protected under substantive First Amendment standards." 408 U.S. at 575 (emphasis added).

The statement, drawn from *Perry* v. *Sinderman,* 408 U.S. at 597, that government cannot deny a benefit to person "on a basis that infringes constitutionally protected interests," including his interest in free speech, is accurately set forth but irrelevant. Appellant does not inform us how the denial of a license to race a thoroughbred horse infringes his free speech interest other than to suggest, in error, that all denials of government benefits based on reasons that are spoken, written or speech-related infringe free speech. See discussion *post*, at 21-22.

The statement that appellant's solicitation of money in exchange for tips on sure winners is attributable to a corporation, and not to him (repeated elsewhere in the jurisdictional statement at 11, 12), is false. First, the record does not include an allegation of corporate status for any of appellant's enterprises. Second, each of the five examples of appellant's solicitations annexed to the Board's decision offer appellant's personal advice and guarantee. See discussion *ante*, at 5-6. The three other examples the Board considered are to the same effect. *Id.* at 6-7.

Appellant's object in invoking the First Amendment—to prohibit the Board from relying on written examples of his solicitations when it considers his license application—reveals a fundamental error in his legal analysis. *See* Jurisdictional Statement at 16-17. Appellant is trying to

use the First Amendment to immunize himself from the consequences of what he has said rather than to support his interest in unrestricted, or relatively unrestricted, speech about matters of public concern or commerce. No decision of this Court has attributed this immunizing effect to the protections of the First Amendment, and were appellant's view accepted, it would have at least two far-reaching consequences that are opposed by established practice and precedent. First, quasi-judicial and judicial tribunals would not be able to receive documentary evidence adverse to its author. Notably, the documentary evidence which appellant is trying to suppress in this case is of incontestable authenticity and probity, amounting to a virtual admission that he is a tout.* Under established evidentiary practice, it would be received and relied on by any tribunal in the land. Second, the government would not be able to rely on an individual's past statements in deciding whether to deny, suspend or revoke a public benefit. In fact, the government routinely relies on past statements when, as here, they are relevant, and its conduct in this regard has been held not to infringe any First Amendment interest. *See* e.g. *Connick* v. *Myers*, 103 S. Ct. 1684, 1690-94 (1983) (discharge of nontenured government employee for speech-related insubordinate conduct held not to infringe employee's First Amendment interests); *Arnett* v. *Kennedy*, 416 U.S. 134, 160-63 (1974)

* Appellant wrote all but one of the eight solicitations the Board considered. *See* S. App. 1a-6a. The statute involved, Racing, Pari-Mutuel Wagering and Breeding Law § 213(2), designates character, fitness and certain occupations as relevant license qualifications. The solicitations, whose content appellant accepts as true (jurisdictional statement at 11 and discussion *ante*, at 4 n. **), describe appellant's occupation and, necessarily, his character and fitness, in literally his own words.

(discharge of tenured employee for speech-related insubordinate conduct held not to infringe employee's First Amendment interests). Indeed, if, as in *Connick* and *Arnett*, employees of long standing, one with tenure, may be discharged for speech-related reasons without infringing their First Amendment interests, the Board, a fortiori, may deny appellant's original application for a thoroughbred owner's license for speech-related reasons without infringing his First Amendment interests.

C. New York Racing, Pari-Mutuel Wagering And Breeding Law § 213(2) is not Unconstitutionally Vague Because It Includes The Word Tout.

Appellant's third challenge, limited to New York Racing, Pari-Mutuel Wagering and Breeding Law § 213(2) (McKinney 1984), formerly New York Unconsolidated Laws § 7915 (2) (McKinney 1979), claims that the statute is unconstitutionally vague because the word tout does not give adequate warning about the type of conduct the statute prohibits. Jurisdictional Statement at 20. An examination of appellant's arguments (*id.* at 17-19), in light of the authorities appellees provided below and the decision of the state supreme court at special term, establishes that appellant is not pursuing a question of constitutional dimension but merely stating a preference for his own definition of the word tout.

A fundamental cannon of statutory construction requires that words be given their "ordinary, contemporary and common meaning" unless they are defined by the statute itself. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975). *Con-*

trast jurisdictional statement at 17, where appellant asserts that whatever tout means in "common parlance," the statute should adopt the meaning the word has in racing circles, and *id.* at 19, where he suggests that § 213(2) is vague because it does not itself define tout.

The Board defined tout in its submissions to special term as a person who sells winners of horse races for pecuniary gain. App. 27a-28a; affidavit of Stephen J. Cipot, sworn to February 5, 1982 ("Cipot affidavit") at ¶ 6. It satisfied the *Perrin-Burns* standard by providing two conforming regular dictionary definitions of the word (American Heritage and Webster's) and a conforming gambling dictionary definition (Scarne's). *See* Cipot affidavit ¶ 11 and Exhibit 5 thereto.* Special term adopted the Board's definition of tout and cited the authorities attesting to it as the "ordinary, contemporary and common meaning" of the word. App. 4a-5a. The court then rejected appellant's claim that Racing, Pari-Mutuel Wagering and Breeding Law § 213(2) was unconstitutionally vague (App. 5a), finding that a "fair reading of its language [including the word tout], as measured by common understanding and practice, clearly gives adequate warning of the type of conduct prohibited." *Id.* at 5a-6a. *Accord, Lewitus* v. *Colwell*, 479 F. Supp. 439, 443-44 (D. Md. 1979) (upholding virtually identical Maryland regulation against vagueness challenge and finding that the warning conveyed by the language was enhanced by "the specific 'nouns' 'bookmakers' and 'touts.'"

Against these authorities, appellant claims that the word tout has a more restrictive definition. Jurisdictional State-

* The Scarne definition (Cipot affidavit ¶ 11, Exhibit 5), like the Board decision (App. 27a-28a), included the notation that a tout's winning selections often purport to rely on inside information.

ment at 17-18. Appellant first notes that in racing circles, a tout is viewed as engaging in fraud and impropriety (*id.* at 18), an observation consistent with definition of tout adopted by special term since an individual who sells guaranteed winners, whether referenced to purported inside information or not, is engaging in fraud and impropriety. Appellant then claims that to be a tout in racing circles, an individual must express fraud and impropriety in a particular way. *Id.* at 17. According to appellant, he must sell different winners in the same race to different bettors. *Ibid.*

Appellant offers no credible authority to support his restrictive definition of the word tout. The Ainslie quotation (jurisdictional statement at 18) does not purport to define touting, but merely to illustrate it. The text of the California Penal Code is not provided (*ibid.*), and assuming it conformed with appellant's definition of tout, no reason appears why the definition of the word in New York must, or should, be the same as the definition in the criminal code of a foreign jurisdiction. The only other information appellant provides to support his definition are statements by two affiants who simply repeat appellant's definition. App. 24a ¶ 8; App. 26 ¶ 8. If this information may be characterized as authority at all, it is certainly not comparable to the objective authorities on which special term relied in adopting the Board's definition as the state law meaning of the word. See discussion *ante*, at 22-23.

Of the deficiencies in appellant's arguments for his more restrictive definition of tout, one is most critical—his complete failure to demonstrate why his definition avoids a finding that New York Racing, Pari-Mutuel

Wagering and Breeding Law § 213(2) is unconstitutionally vague when the Board's definition supposedly invites that finding. To make the required demonstration, appellant would have to have shown how § 213(2) provided a more adequate warning about the type of conduct it prohibits when tout means selling different winners in the same race to different bettors as distinguished from selling all bettors one winner in a race. Of course, appellant cannot make the required demonstration because one definition is no more adequate than the other in terms of the warning the statute provides. Indeed, since appellant has not, and cannot, establish that the definition of the word tout he offers is required to save § 213(2) from unconstitutional vagueness, his challenge to the statute on this point amounts to no more than a preference for his own definition over the state law meaning of the word.

D. Appellant's Claim That The Denial Of His Application For A Thoroughbred Owner's License By The New York State Racing And Wagering Board Was The Result Of Selective Prosecution Is Not Colorable.

Appellant's last challenge to New York State Racing Pari-Mutuel Wagering and Breeding Law § 213(2),(3) (McKinney 1984), formerly New York Unconsolidated Laws § 7519(2),(3) (McKinney 1979), alleges selective prosecution in violation of the Equal Protection Clause. Jurisdictional Statement at 20-21. The one allegation made in support of the claim—that handicappers have been granted thoroughbred owner licenses whereas touts have not (App. 24a ¶ 9)—denies the claim even colorable status.

As special term observed, handicappers and touts have different occupations. App. 4a. Handicappers rate entries

before post time and figure out the order of finish based on factors like distance, weight, track conditions and past performance. *Ibid.* Touts select a winner in each race, without announcing the chances of the other entries, and often present their selection as based on inside information not available to the best handicapper. App. 4a-5a, 27. Handicappers are engaged in completely legitimate activities. App. 4a, 27a. Touts are not. App. 4a-5a, 27a-29a. Thus, if the New York State Racing and Wagering Board has granted thoroughbred owner licenses to handicappers and denied them to touts, as appellant claims, it has not adopted a selective policy based on an arbitrary classification. *Oyler* v. *Boles*, 368 U.S. 448, 543 (1962). It has adopted an even-handed policy based on occupational differences that appellant ignores.

Conclusion

For the foregoing reasons, the appeal should be dismissed because the Court is without jurisdiction, the alternative request for a writ of certiorari to the New York Court of Appeals should be denied, and the appellees should be awarded the printing costs for the supplemental appendix.

Respectfully submitted,

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State of New York
Attorney for Appellees

ROBERT HERMANN
Solicitor General

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Of Counsel

SUPPLEMENTAL APPENDIX

Example One

[LETTERHEAD OF]

NATIONAL TURF CLUB
SUITE 320
10 LIGHT STREET
BALTIMORE, MARYLAND 21202

SPECIAL ANNOUNCEMENT—RACING SECRETARY WILLIAM CASHEM WILL TRAVEL TO SARATOGA RACE TRACK, NEW YORK TO PERSONALLY SUPERVISE ONE OF THE BIGGEST AND MOST SPECTACULAR STABLE KILLINGS OF ALL TIME GOING WEDNESDAY, AUGUST 18TH.

LET HIM GIVE YOU THIS O.K.—DIRECT FROM THE SCENE OF ACTION IN NEW YORK AND I ASSURE YOU THAT YOU'LL WIND UP BETTING ON A WINNER!

Dear Racing Fan:

I'm sure you'll agree that the NATIONAL TURF CLUB needs no introduction and Racing Secretary William Cashem has become synonymous with WINNING RACING. His name has become highly regarded in racing circles and it's your GUARANTEE that when you do business with him—you are dealing with a bonafide and legitimate Horseman, a PROFESSIONAL in every sense of the word!

Operating as the exclusive behind-the-scenes agent for the National Turf Club, Bill Cashem has to make decisions on racing information that either spells [sic] Profits and Winners or losses and losers. Just let me recount what Bill Cashem did the last time he made the journey "up the road" to New York on Friday, July 16th. It was for a SPECTACULAR STABLE KILLING, a real money-making deal that

Example One

was planned weeks in advance. He was promised and promised an easy winner at a high price . . . 20-1 or better! Of course, he informed all National Turf Club patrons well in advance to take advantage of such a Golden Opportunity. Now here's what happened: The planned event went off without a hitch. The horse, BEYOND REASONING, came winging down the stretch to tally by 2½ widening lengths and paid a very solid $10.20 to WIN! Moreover, some days before the event he was told that there was just no way this filly would pay 20-1 ($40) . . . she'd win mind you, but that 20-1 payoff was out of the question. He was perplexed. He made a promise to his subscribers that not only would he get them an easy winner, but one that would pay off in the high 4 figures. Bill felt terrible. He did not want to lose his creditability. He had to do something. This is what he did. He reached in and got word on another "stable killing" scheduled for the very same day. The horse was name JAMIE DORN who ran up the track in her last start. But when Bill gets word, it's "the word." She won by 2½ lengths making one bold move deep in the stretch and returned $11.20 for every 2 bucks. And best of all, JAMIE DORN was in the 9th race that day and was the key horse in a $269 triple! That trip to New York amounted to a 25-1 WIN PARLAY as every participant who invested $20 BUCKS got back over $500 DOLLARS . . . and that's not counting the money they made with betting the triple. These are *all facts, not stories*! It was another Banner Day for NATIONAL TURF CLUB subscribers as thousands and thousands of dollars in profits were realized by Bill Cashem followers.

Why and how can such a thing happen, especially after you hear of all the losses suffered by so many racing

Example One

> fans. Why is William Cashem so successful, how does he do it? How does he pick winners day in and day out —you asked why?—I'll tell you! . . .

He's a professional. He knows everyone of importance around the racetrack. He's been dealing with the racing fraternity for more years than I'm sure he cares to remember and can boast of keeping the same patrons who joined his ranks from the very beginning. Racing Secretary Bill Cashem has a closet literally jammed packed with unsolicited testimonials and it's open to anybody who cares to read them. You're right. This is something to "crow" about. When people can continue doing business with somebody in this field for any length of time, you KNOW he must have PLENTY "on the ball"—because in this profession there is NO ROOM FOR A LOSER . . . ONLY WINNERS! And then to take the time to compose testimonial letters, that's all the thanks anybody could ever need. It's our Racing Secretary's best reward, to know you can do something— to be the best at it —and to be appreciated!

But let's get back to those WINNERS. We have set aside a day for a SPECTACULAR STABLE KILLING that has been planned for WEDNESDAY, AUGUST 18TH. It is very difficult for me to describe this SELECT piece of information, except to say that during the course of AN ENTIRE RACE MEET, something of this sort can come up once or twice at the very most, if at all.

This piece of information is really in a class by itself! On form, nobody will give this thoroughbred the slightest kind of chance to finish on the board. This speedster has been so well "hidden" that even most of the grooms and stablehands around the barn have given up on him. But this is

the way these horsemen have planned this caper . . . and when they cut this one loose for THE MONEY on WEDNESDAY, AUGUST 18TH, the race should prove "NO CONTEST"—this goodthing should gallop home on top with 3 or 4 lengths to spare!

[2] In this event on AUGUST 18TH, NOBODY WILL KNOW WHAT IS HAPPENING UNTIL IT IS TOO LATE TO DO ANYTHING ABOUT IT! That is, NOBODY BUT BILL CASHEM FOLLOWERS who will join with him on this Spectacular Stable Killing on AUGUST 18TH at SARATOGA RACE TRACK. To the average fan who picks up his newspaper the following day, it will seem like just another LONGSHOT that has "SNEAKED IN"—and to a certain extent, this will be true. This Betting Tool will "SNEAK IN" and catch everyone not on the "inside" napping . . . that is EVERYONE BUT NATIONAL TURF CLUB PATRONS under the expert guidance of WILLIAM CASHEM! We will KNOW and we will COLLECT: it is as simple as that!

> WILLIAM CASHEM WILL PERSONALLY MAKE THIS EXTENDED TRIP FOR ONE REASON AND ONE REASON ONLY: TO MAKE CERTAIN WE COLLECT ON A NO IFS, ANDS, OR BUTS WINNER!

I'm not at liberty to go into further details concerning this SPECTACULAR STABLE KILLING because ALL ANGLES and every bit of planning are being kept a closely guarded secret. The people behind this event are leaving NOTHING TO CHANCE—and this race shapes up as the MOST SOLID RACING INVESTMENT that we have been involved with in years. I honestly can't see how we can miss COLLECTING at the juiciest kind of odds.

Example One

BEST OF ALL, WILLIAM CASHEM WILL BE AT SARATOGA RACE TRACK PERSONALLY EACH MORNING ONE FULL WEEK BEFORE THE DATE THIS KILLING IS BEING PLANNED FOR—SO THAT HE CAN ATTEND TO EVERY DETAIL PERTINENT TO MAKING CERTAIN THAT THIS PROPOSITION WINDS UP BRINGING US HUGE 4-FIGURE PROFITS! EVERY FACTOR WILL BE CAREFULLY GONE OVER—NO LOOSE ENDS WILL BE LEFT UNTIED THAT MIGHT HINDER THE SUCCESS OF THIS EVENT . . .

AND WE'LL MAIL THIS O.K. SO THAT IT REACHES YOU AT LEAST 2 DAYS BEFORE POST!

Yes, we will service you personally! We'll get the letter out to you 5 days before this race is run and we will handle it personally. We don't want this information to "leak out" for any reason. I KNOW that we can count on this LONGSHOT to romp home the easiest kind of a WINNER and we'll send it off to you DIRECT FROM THE SCENE OF ACTION AT SARATOGA RACE TRACK, NEW YORK. We KNOW what we've lined up for you on AUGUST 18TH . . . don't miss this goodthing for any reason!

Getting back to this spectacular killing on AUGUST 18TH, it must be handled in the following manner. Commitments to the "smart money" contacts involved in this information runs into a really tremendous figure! But we have managed to keep your cost down to a minimum of ONLY $10 as the full fee. There will be no other propositions accepted!

No matter how much money you've sent in the past on WINNERS, and regardless of what your relationship with the National Turf Club, this $10 ADVANCE PAYMENT is a MUST! We can make no exceptions—this information is worth at least TEN TIMES THE $10 FEE we're asking: I advise you that you don't miss it for any reason.

Mail in your $10 payment right now! Use the handy envelope that needs no postage today. And please, don't hes-

Example One

itate or wait or think about it, because delay could cause you to miss out on one of the best racing investments you've ever made.

Act now! Mail your $10 today. We'll get you on the WINNER list and see to it that you get this O.K. by MAIL at least TWO DAYS IN ADVANCE of the race! This is definitely the BIGGEST EVENT of the SARATOGA RACING MEET so mail your $10 through immediately.

Your friend,
/s/ KEN MARTIN
KEN MARTIN
Turf Editor, National Turf Club

P.S. I know it's nice to be a big man with your friends and let them in on sure fire winning releases, but please, not this time. This is for our exclusive pickings, as every fluction [sic] of the tote board will mean Big Bucks for us. KEEP THIS RELEASE TO YOURSELF ONLY!

* * * * * MAIL THIS COUPON WITH $10 * * * * *

NATIONAL TURF CLUB
10 Light Street, Suite 320
Baltimore, Maryland 21202

Enclosed is $10 for the SPECTACULAR STABLE KILLING going on WEDNESDAY, AUGUST 18TH at SARATOGA RACE TRACK, NEW YORK. Please air mail this information to reach me at least 2 days in advance of the AUGUST 18TH date of Winning Action.

NAME _____

ADDRESS _____

CITY/STATE _____ ZIP _____

* *

Example Two

[LETTERHEAD OF]

NATIONAL TURF CLUB
SUITE 320
10 LIGHT STREET
BALTIMORE, MARYLAND 21202

[STAMP]

100%
PERFECT

A SPECIAL RACING INVESTMENT HAS BEEN ARRANGED FOR PRIVILEGED INVESTORS FOR SUNDAY, JUNE 28TH AT BELMONT PARK, N.Y.!

Dear Racing Fan:

We have just received the exclusive inside word on one of the most SPECTACULAR RACING INVESTMENTS ever to be planned at any major race track in the country: and it is with great pleasure that we are due to offer you the opportunity to participate in this stunning upset at BELMONT PARK, New York, provided of course, that you can meet the heavy financial obligation necessary for participation in this "SPECIAL" Racing Investment on SUNDAY, JUNE 28TH.

This is a COMPLETELY FOOLPROOF piece of racing business, set to earn "privileged investors" some really DECENT PROFITS. Why if you join the special group of "insiders" JUNE 28TH, you can plan on making a trip to your bank the very next day, MONDAY, JUNE 29TH, to deposit the biggest batch of racing PROFITS that you've ever COLLECTED!

The Horsemen involved in this coup, claim that this BETTING TOOL is in a spot he can't possibly miss winning!

Example Two

[Word illegible] form on this undercover runner points him out to look like a valid dud, which is just fine with us. Because while nobody gives this unknown a 2nd glance, he'll come charging home on top lengths ahead of his field—and we'll wind up with some of the Biggest Profit-taking ever! In fact, the public will not "believe their own eyes" when they see this one romp home easily without even "raising a sweat." They'll be caught totally unawares . . . and that's the way it will be! But You can Know Before, and get yourself a piece of the Biggest Kind of Profits Ever, if you join us on this gala money-making occasion

It is really a strong temptation for us to tell you how much we Know about this Special June 28th maneuver! However, if I don't keep these details Completely Secret, we could jeopardize our position with race track contacts. But believe me, we Know all that We Should Know! Saying anything further until it is time to Bet and Win on June 28th would be unwise. If there is any way possible for you to join this special group of investors on this "Super" situation at Belmont Park, N.Y., make sure you do so!

There Shouldn't Be the Slightest Factor
of Risk Involved With This Longshot Now!
Every Possible Element of Chance Will Be
Considered and Attended To . . . Everything
Possible to Make This the Most Solid Racing
Investment Ever Will Be Taken Care Of!

Our Fee for This "Special Racing Investment"
On June 28th Is One Hundred Dollars!

We are well aware that $100 is not a small fee to pay unless you are independently wealthy. If you can't afford the

Example Two

$100 fee, we understand. Our Win/[word illegible] information is certainly within everyone's budget. So avail yourself of this other excellent WINNER service, for consistent profit-making.

But, of course, if you want the BEST—and if you can afford to handle a minable [sic] investment [sic: word omitted] one piece of racing information in a class all by itself, make it your business not to miss this Special Racing Investment on JUNE 28TH for extra-ordinary PROFIT TAKING! Mail your $100 remittance NOW!

[2] [Four lines illegible.]

Join the "privileged group and win big. Mail $100 today. This is 100% perfect: [sic: rest of sentence omitted.]

* * * * "100% PERFECT" INVESTMENT * * * *

NATIONAL TURF CLUB
10 Light Street, Suite 320
Baltimore, Maryland 21202

Enclosed is my $100 payment! Please list me to receive your "Special Racing Investment" going SUNDAY, JUNE 28TH, at BELMONT, N.Y. I'll phone (301) [number illegible] on that day after 10 A.M. COLLECT for this SOLID WINNER!

NAME _____

ADDRESS _____

CITY/STATE _____ ZIP _____

* * * * * * * * * * * * * * * * * * * *

Example Three

MIKE WARREN SPORTS

13966 Seal Beach Blvd.
Seal Beach, CA 90740 (213) 594-4638

I'VE UNCOVERED A SECRET
MOVE GOING AT SANTA ANITA'S
OAK TREE MEET
ON SATURDAY, OCTOBER 31

Only 100 of My Friends
Can Get This Winner!

Dear Friend:

We've ripped them up in Del Mar with winners as Berry Bush, Gam Bey, French Charmer, Prodigious, Advocatum, Chablis, Tizon and dozens others . . . many paying boxcar prices.

But, the best score is coming on Saturday, October 31. My backstretch sources have ferreted out a super runner, a will win horse so strong that I Guarantee This Horse Will Win!!

[Line drawing not reproduced. Message in bubble states:] Confidential to Top Subscribers only!

Example Three

The word on this horse is so secret that only my most inside people know about it . . . and the word will not get out.

That means we can expect at least 10 to 1 mutuel on the surest thing since Spectacular Bid was the only horse to enter a race, this horse that my main man has spotted will make the Bid's walkover look like a tough event, so easy will this runner romp and at a price.

This horse is being prepared for a race to be run at Santa Anita on Saturday, October 31.

He Will Win, No Ifs, ands of Buts or Shoulda, Coulda, Wouldas. This Is the Strongest Play of the Year!

Now, to protect the price, I am only releasing the name of this horse to One Hundred customers and you, because you are such a good customer, your have a shot at getting in.

More . . .

[2] Usually, I ask that you pay me after you win, but this is an unusual case—information so strong that I had to lay out the money in advance. I don't usually do this, but this came from my best source and he is a man Who Is Never Wrong.

Example Three

So, the lucky 100 who get in must send a $100 payment in advance. The money should be wired to me by Western Union in my name to Mike Warren, c/o Western Union, 214 Locust Ave., Long Beach, CA 90802.

[Photograph of horse race not reproduced.]

The $100 is guaranteed. So strong is this selection that THIS HORSE MUST WIN OR YOU GET YOUR MONEY BACK PERIOD!

Subscriptions will be on a first come, first served basis so act today. Get the $100 guarantee horse for Saturday, October 31 by wiring the $100 payments to Mike Warren, c/o Western Union, 214 Locus Ave., Long Beach, CA 90802.

CALL

(213) 594-4638

and charge the $100 fee to your

MASTERCARD OR VISA

[Mastercard logo not reproduced.]

[Visa logo not reproduced.]

[Photograph of horse race not reproduced.]

I don't often get horses so strong that I can give a money back guarantee. If you can afford to make $10,000 or more act right now. Call us at 213-594-4638 or wire the money today to ensure your spot.

Example Three

The day before the race you will be sent a telegram with the name of the horse and what race he is in. The telegram is for your eyes only and you should not let anyone, not your spouse, not your father, not your brother-in-law. THIS IS THE HORSE FOR YOU TO SCORE . . . AND YOU ONLY!

I want to protect the price and so do you so don't even hint to anyone that this horse is running.

Wire the money or call today. October 31 is coming right up SO GET IN ON THE LUCKY HUNDRED!

Sincerely,

/s/ MIKE WARREN

MIKE WARREN

Example Four

[NEW YORK DAILY NEWS April 11, 1981]

How to rob race tracks legally.

The secret of how America's Number One Handicapper "stole" over $2,772,546 from the racetracks last year all legal—all legitimate—and how *you* can do the same.

First of all, let's get one thing straight. I'm not a gambler. I'm a businessman. So when I go to the track, I'm not placing a bet. I'm making an investment.

But unlike any businessman I ever heard of, I don't settle for a 10, 20, or 30% return on my investment, I insist on a profit of 300% . . . every single day . . . and what's more . . . I GET IT. Do I have your interest? Good. Now let me tell you how it works.

On a typical day at the track, when a certain type of race comes up, I look up the Past Performance charts in the Daily Racing Form. I spend no more than 5 minutes doing simple grade school arithmetic. Then, excusing myself from my guests at my table at the track restaurant, I place my bet and then I rejoin them. And as we resume our conversation, I sit there fully confident that I have an 83% chance of winning!

[Photograph of Mike Warren not reproduced. Caption states:]

Mike Warren noted turf analyst and self made millionaire who now wants to share his latest secret with you.

Example Four

You read it correctly: e-i-g-h-t-y t-h-r-e-e percent! And the track can't do a thing about it. It's all legal and all legitimate. If everybody knew what I know . . . if everybody had my "secret", the prices on these races would plummet to ground zero. But of course, no one does know the secret except the two of us—myself and a very special friend I'll tell you about later. Meanwhile [one and one-half lines illegible].

Notice the number? . . . $2,772,546
Sure I've had good years before—years where I did $500,000 and $600,000. But this year . . . Forget it!

[Facsimile of a portion of a 1979 tax return showing $2,772,546 not reproduced.]

The ball game is over. We've broken the bank. I can now rob racetracks at will!

[Stamped received April 21, 1981.]

Example Five

"Hi.
"I'm Mike Warren, and I'd like to tell you about pay-win . . . the amazing new way to sure-fire racing profits from The Baltimore Bulletin. We send you winners . . . you pay absolutely nothing until after you've won and collected. Fair enough? Read on . . ."

[Photograph of Mike Warren not reproduced.]

November 25, 1974

Dear Friend of the *Bulletin*:

When it comes to racing information, isn't it about time someone started giving you the *best of it*?

If you're like most racing fans, you don't mind paying for the *right information* . . . but you're tired of paying in advance for horses that don't win!

So here's a *money-winning service* that *costs you absolutely nothing* until you've 1) received our scheduled release *by mail—well in advance of post time*; 2) *made your wager* at the track or your favorite OTB office, [sic] and 3) *collected your money* from the cashier and *put your winnings in your pocket.*

Then—and *only* then—do you pay me for this winning information at the steady rate of a *$5 win wager*—and that rate *never increases.*

Example Five

You pay me my small fee only after you've won, only after I've given you winners, and only after you have *collected your money*! That's right. *NO* payment in advance . . . *NO* "enrollment" fees . . . *NO* partial remittance" to help pay for "administrative costs" or "postage and handling." We send you this information *in plenty of time for winning action* . . . and *all you do is cash tickets*!

"Hold it," you're saying right now," ". . . what's the catch?"

Believe it or not, *there is no catch*! This offer is made to you in good faith as one trusted friend to another . . . *and* you *risk absolutely nothing.* If I don't produce for you, I don't get paid. *It's as simple as that.* However, to discourage those that have no intentions of honoring their obligitations, I must ask that you send $5.00 with the coupon enclosed . . . but to show you beyond a shadow of doubt that my intentions are sincere, you may deduct this amount (Over, please) . . . [2] later [two lines illegible]. What could be fairer?

Of course, I realize that I'm taking a chance. There are a few unscrupulous people out there who will take advantage of this offer and then decide not to pay me after I send them winners. That's where the $5 comes in . . . at least I won't be left "holding the bag" completely. We live in an imperfect world, and, no matter how careful we are, what strategy we use, someone, somewhere, is going to try to get something for nothing.

Example Five

But I know that you are not one of them. You are known to me as an honest person. I know you will shoot straight with me . . . and you can be absolutely certain that I will always give you "the best of it" in return. Besides, I reason you'd have to be crazy not to part with a few dollars if I can show you the road to wealth with *enough money* to do *what you want*!

Now . . . let's talk about PAY-WIN. PAY-WIN is only three months old . . . but already has gained a national reputation as the *most fantastic winner-picker service in North America.* Plays average about five (5) a months, and here's the actual record to date:

[The chart that follows is set forth at 18a.]

Date	*Track*	*Horse*	*$2 Win Paid*	*$5 Gross Profit*	*$5 Gross Profit (Cum.)*
August 30	Belmont	John DeGreat	Lost	—	$ 5.00—
September 11	Belmont	Green Gambados	$20.00 WON	$ 50.00	45.00
September 14	Belmont	Big Spruce	$12.80 WON	32.00	77.00+
September 18	Belmont	Warminster	Lost	—	72.00+
September 24	Belmont	Spear Carrier	$16.00 WON	40.00	112.00+
September 30	Belmont	Splutterfuss	$ 8.60 WON	21.50	133.50+
October 7	Belmont	Turkish Coffee	Lost	—	128.50+
October 11	Belmont	Never Call Retreat	Scratched	—	128.50+
October 17	Aqueduct	American Mystery	$ 4.20 WON	10.50	139.00+
October 22	Aqueduct	Trupan	$31.60 WON	79.00	218.00+
October 28	Aqueduct	Never Retreat	$ 6.80 WON	17.00	235.00+
November 4	Aqueduct	Daisy Mason	$57.20 WON	143.00	378.00+
November 9	Aqueduct	Brown Cat	$ 6.80 WON	17.00	395.00+
November 20	Aqueduct	Warrens Folly	Scratched	—	
November 28	Aqueduct	True Knight	Results unavailable at press time.		

Example Five

There you have it. Fifteen (15) releases in just over three months . . . nine (9) winners, including five (5) double-digit payoffs, two (2) scratches, and a release that has not started as we go to press. Check it out. See for yourself if True Knight also wins his race November 28th. Still and all, I have a *batting average of almost 70% . . . and a $390 return on your initial investment!* The truth is *you can't help but make money with* PAY-WIN . . . *and isn't that nice for a change?*

How do I do it? I think you already know the answer to that one. I have the right contacts, the right connections . . . and I take mighty good care of them! You know as well as I do that this game is not for the lucky . . . it's for the informed. And that information costs money. I have no way to pay my sources except from the PAY-WIN profits I make after sending out a winning release. I'm taking the risk—not you! Aside from the $5 I'm asking you to put up which is fully deducted from the very first winner, all I ask of you is that—if you agree to participate in this service you remit the proceeds of a $5 win wager *after you've won and collected.*

That's all there is to it. You owe it to yourself to join the ranks of PAY-WIN subscribers . . . and to *help yourself to the most astounding profits you'll ever see.*

Just fill in and initial the enclosed "No-Risk Subsription Form" . . . a postage-paid envelope is provided for your

Example Five

convenience. *Could anything be easier?* Let's make some money!

Next 2 Winning Releases Scheduled for:
December 7th
December 16th

Yours for Winners,
Mike
/s/ MIKE WARREN
Turf Editor

P.S. If one winner a week isn't enough take a look at our DAILY PARLAY SERVICE enclosed. It's sensational! [Last three words only partially legible on copy.]

[Stamped received December 9, 1974.]